No. 10-620

In The

Supreme Court of the United States

PROCESSING SOLUTIONS, LLC, FIRST EAST, INC. AND INSTANT CASH USA, INC.,

Petitioners,

v.

AMY LYNN BAILLIE,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does this Court have jurisdiction under 28 U.S.C. § 1257 to review a judgment of the California Court of Appeal where the federal issue on which Petitioners seek review:

(a) was neither raised in, nor decided by, the trial court;

(b) was neither raised in, nor decided by, the Court of Appeal;

(c) was not raised in the petition for rehearing in the Court of Appeal; and

(d) was raised for the first time in an unsuccessful petition for review to the California Supreme Court.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	ii
Introduction	1
Statement of the Case	1
Reasons for Denying the Petition	4
Conclusion	7

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 6, 7

Bailey v. Anderson, 326 U.S. 203 (1945) 6

Beck v. Washington, 369 U.S. 541 (1962) 6

Crowell v. Randell, 35 U.S. 368 (1836) 5

Guz v. Bechtel Nat'l Inc., 8 P.3d 1089 (Cal. 2000) 5

Jimenez v. Super. Ct. (T.M. Cobb Co.), 58 P.3d 450 (Cal. 2002) 6

Street v. New York, 394 U.S. 576 (1969) 5

STATUTES

28 U.S.C. § 1257 1

RULES AND REGULATIONS

Cal. Rule of Court 8.500(c)(1) 6

OTHER AUTHORITIES

Gressman, et al., *Supreme Court Practice* 187-88 (9th ed. 2007) 5

INTRODUCTION

Petitioners ask this Court to review an intermediate state-court ruling that does not even discuss, let alone decide, the federal question presented in the petition. That federal question, moreover, was not properly preserved by petitioners before the state courts. Although they made general references to the Federal Arbitration Act for other purposes, petitioners did not raise the question of federal preemption in the state trial court or in the state appellate court, and therefore did not properly preserve the issue for review before the state's highest court. The petitioners' failure to present a federal question over which this Court possesses jurisdiction is compounded by their complete failure to satisfy this Court's Rule 14(g)(1)-which is designed to alert the Court to such jurisdictional defects in the first place.

This Court manifestly lacks jurisdiction under 28 U.S.C. § 1257. In light of that elementary jurisdictional defect, the Court should neither grant nor hold the petition pending No. 09-893, *AT&T v. Concepcion*, but should instead deny certiorari at the outset.

STATEMENT OF THE CASE

In July 2006, respondent Amy Lynn Baillie received a short-term $300 loan over the Internet – with an interest rate of 1,216.667% per annum – from MTE Financial Services, Inc., dba Instant Cash, USA, which purports to be a tribal entity formed by the

Modoc Tribe of Oklahoma. Petitioner Processing Solutions, LLC assisted Instant Cash USA in marketing its loans and processing loan applications that were submitted by applicants, such as Baillie, over the Internet. The Note provided for arbitration of disputes under the Rules of the National Arbitration Forum ("NAF").

Baillie sued petitioners, alleging usury and unconscionable lending and seeking injunctive relief and restitution under state law. Petitioners responded by seeking to compel arbitration. Plaintiffs opposed the motion and the trial court denied it. In its order, the trial court stated that the arbitration agreement did not "clearly and unmistakably" provide that the arbitrator will decide whether the Note is subject to arbitration; that it was a contract of adhesion to permit the arbitrator to decide issues related to the enforceability of the arbitration clause, that such a provision was substantively unconscionable; and that California law applied.

Specifically, the trial court found the arbitration agreement both procedurally and substantively unconscionable, in part because, under the circumstances, the enforcement of the arbitration clause and the included class arbitration waiver would act as a de facto exculpatory clause in violation of California law.

Petitioners appealed the order denying the motion to compel arbitration. The California Court of Appeal affirmed the trial court's decision entirely on

state-law grounds, holding that (1) the trial court was empowered to decide the issue of the enforceability of the arbitration agreement; (2) the arbitration agreement was unconscionable; and (3) the trial court did not abuse its discretion in deciding that even if the class action waiver was deemed unconscionable, the remainder of the arbitration agreement was unenforceable and should not be severed.

In the Court of Appeal, petitioners made the following arguments – none of which relied on a theory of federal preemption:

- The trial court erred in failing to refer the question of arbitrability to the arbitrator in accordance with the parties' arbitration agreement;
- The plaintiff, Baillie, did not meet her burden of showing that the arbitration agreement was unenforceable;
- The trial court erred in holding that the arbitration agreement was unconscionable;
- The arbitration agreement was not substantively unconscionable; and
- The arbitration agreement is not unconscionable merely because it contains a class action waiver.

The issue of preemption was never raised by petitioners in the California Court of Appeal, either in petitioners' opening brief, the reply brief, or in their

petition for rehearing to the California Court of Appeal.

In their petition for rehearing to the California Court of Appeal, petitioners made only two arguments:

- The finding against severance of the class action waiver was not supported by substantial evidence;
- Rehearing was required because the Court of Appeal's opinion conflicts with settled law that unconscionable provisions may be severed from an arbitration agreement.

Petitioners then filed a petition for review in the California Supreme Court, where, for the first time, they raised the issue that they have presented to this Court: "whether, under the Federal Arbitration Act, a state court may invalidate an arbitration agreement as being unconscionable, because it contains a class arbitration waiver, even though the parties are able to vindicate their rights in arbitration on an individual, and not class, basis." The California Supreme Court denied the petition without comment. (Pet. App. A).

REASONS FOR DENYING THE PETITION

Irrespective of the result in the pending case of *AT&T v. Concepcion*, this petition should be dismissed for lack of jurisdiction.

The state court did not even discuss, let alone decide, the federal question presented by the petition. In the California Court of Appeal, the only mention of the Federal Arbitration Act by petitioners in the Table of Contents of their Opening Brief is in connection with the section of their brief dealing with the decision of the NAF to stop accepting consumer disputes, and in the brief itself, that the arbitration agreement is governed by the Federal Arbitration Act. The Federal Arbitration Act is not even mentioned in the decision of the California Court of Appeal. (Pet. App. C).

This Court's general practice, under such circumstances, is to assume that jurisdiction is lacking. *See Street v. New York*, 394 U.S. 576, 582 (1969). "[W]hen the highest state court fails or refuses to pass expressly upon a federal question, the party invoking the Supreme Court's jurisdiction has the high burden of showing that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for want of proper presentation." Gressman, et al., *Supreme Court Practice* 187-88 (9th ed. 2007); *cf. Crowell v. Randell*, 35 U.S. 368, 391 (1836) (Story, J.) ("If both of these [the raising and the deciding] do not appear on the record, the appellate jurisdiction fails.").

To be sure, petitioners did present the federal preemption issue for the first time in its petition to the California Supreme Court, but the California Supreme Court's practice is to "decline to decide issues not addressed by the Court of Appeal." *Guz v.*

Bechtel Nat'l Inc., 8 P.3d 1089, 1109 (Cal. 2000); *see* Cal. Rule of Court 8.500(c)(1) (California Supreme Court "normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal"); *Jimenez v. Super. Ct. (T.M. Cobb Co.)*, 58 P.3d 450, 455 (Cal. 2002). Where the state courts, according to their own practice, would not reach the federal issue under the circumstances, neither should this Court. *See Beck v. Washington*, 369 U.S. 541, 553 (1962); *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945).

Because "it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider," this "rule affords state courts an opportunity to consider" the questions in the first instance. *Adams v. Robertson*, 520 U.S. 83, 90 (1997). The state courts here were not given that opportunity and, accordingly, this Court should deny review.

Finally, the petition should also be denied because it violates this Court's Rule 14.1(g)(i), which requires a petition for certiorari to specify when and where the federal questions sought to be reviewed were raised in the state courts, including "pertinent quotations of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears." Under that rule, even a "general citation fails to comply with [this Court's] requirement that petitioners provide [the Court] with '*specific* reference to the places in the

record where the matter appears." *Adams v. Robertson*, *supra*, at 89 n.3. Here, petitioners have not even attempted to comply with the rule.

CONCLUSION

Because this Court lacks jurisdiction, the petition for certiorari should be denied.

Respectfully submitted,

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